No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, FIREMAN'S FUND INSURANCE COMPANY, a corporation, CHAS. R. McCORMICK LUMBER COMPANY OF DELAWARE, a corporation, and McCORMICK STEAMSHIP COMPANY, a corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

BRIEF OF RESPONDENT

CARL C. DONAUGH,
United States Attorney,
U. S. Courthouse, Portland, Oregon,
E. K. OPPENHEIMER,
ROBERT T. MAUTZ,
Board of Trade Building,
Portland, Oregon,
JOHN H. BLACK,
233 Sansome Street,
San Francisco, Calif.,
Attorneys for Petitioners.

BEN ANDERSON,
WM. P. LORD,
T. WALTER GILLARD,
317 S. W. Alder Street,
Portland, Oregon,
Attorneys for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND 10770

INDEX

CASES CITED

INDEX (*Continued*)

AUTHORITIES

No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1942

WM. A. MARSHALL, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, FIREMAN'S FUND INSURANCE COMPANY, a corporation, CHAS. R. McCORMICK LUMBER COMPANY OF DELAWARE, a corporation, and McCORMICK STEAMSHIP COMPANY, a corporation,

Petitioners,

vs.

G. PLETZ,

Respondent.

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Gus Pletz, a longshoreman by occupation, was working on the SS. West Planter, belonging to the McCormick Steamship Company. On November 12, 1935, this vessel was berthed at the McCormick Terminal in the city of Portland. Pletz was working in a hatch, assisting in loading cargo, when an oil drum fell out of the sling and struck him on the shoulder

and back, causing him to sustain personal injuries. He was immediately taken to St. Vincent's Hospital and placed under the care of Dr. L. V. Belknap. Dr. Belknap was not only consulting physician for the McCormick Steamship Company, but was also physician for the insurance carrier under the Longshoremen's and Harbor Workers' Compensation Act, the Fireman's Fund Insurance Company.

Three days after the accident, Wendell Gray, Esq., an attorney and an assistant in the office of Messrs. Raffety & Pickett, claim agents for the insurance carrier, called on Mr. Pletz at the hospital, and Mr. Pletz testified at the hearing before the Deputy Commissioner, "and I couldn't speak, so he said he come back eight days later."

The purpose of Mr. Gray's visit was to obtain a statement of the facts of the accident, and to secure an acceptance of the compensation benefits due Mr. Pletz under the Harbor Workers' Act. The fact of this call and the discussions which took place between Pletz and Mr. Gray become significant as bearing upon the question at this time of planting in Pletz's mind that the representative of the McCormick Steamship Company was solicitous about him, and this was increased by the inquiries said to have been made by one Charley Rudberg, a superintendent of the McCormick Steamship Company, who was said to be "inquiring about me all the time in the hospital." Mr. Gray, however, was not successful in securing the statement at this time owing to the debilitated condition of Mr. Pletz.

Mr. Gray returned in about eight days and wrote out a statement of how the accident occurred, and Mr. Pletz signed it, and Mr. Gray took it away with him. This statement was signed on November 15, 1935, and is appellee's Exhibit 1, found on page 231 of the Apostles. After identifying Pletz as the individual who was injured and reciting certain facts that showed that a slingboard had been overloaded by the longshoremen, the statement concludes with this statement:

> "The winches were working all right and the winch driver was handling the winches carefully and properly. The cause of the accident was due to placing one too many drums on the slingboard. That was the second load of six drums."

Mr. Gray was called as a witness and identified the statement and related the circumstances under which it was signed. He testified, "My employment consisted in investigating these cases,—Yes, longshoremen's cases." He testified that he was notified by the McCormick Steamship Company of the accident, and that he went to the hospital and interviewed Pletz, and that he had two purposes for interviewing him. One was to ascertain the nature of his injury, and the other to ascertain whether or not there existed what is known as a third party claim.

On the second visit, about the 15th of November, 1935, Mr. Gray had a check made out for the amount of compensation that was payable to Pletz on account of this accident. The following appears in the transcript: (A. 218)

"A. Well, I don't know, he said, 'I am willing to advance you money if you need some, and I asked him how much he was going to get me, and he said fourteen dollars, and I don't know now whether it was forty cents or twenty cents."

Pletz was released from the hospital after a few weeks of convalescence, and he called at Mr. Pickett's office, which was located in the Mead Building. The following appears on pages 219 and 220 of the Transcript:

"Q. And what did Mr. Pickett say?

A. Well, he was going to give me the compensation. 'Well,' I said, 'I knowed that some guys get up to twenty dollars and so on, and I think that fourteen dollars was not enough.' * * * *

Q. Did you make repeated efforts to get your compensation refixed or not?

A. Yes, I tried to, and I was asking Mr. Pickett if he could get some kind of an agreement. I did need money, but I didn't want to let the doctor go. Mr. Pickett said he was willing, he would rather make a settlement with me than pay me the compensation."

From the foregoing testimony it will be seen that several months transpired and Pletz had not been paid compensation, although the insurance carrier was willing to pay it. During this period the claim attorney was loaning Pletz money to get along on.

Under the rules and regulations of the U. S. Employees' Compensation Commission, compensation matters arising under the Act are transacted by established procedure, and forms are furnished to employers to transmit to the Deputy Commissioner for

the district. These approved forms were used in this instance. On page 235 of the Apostles there appears "EMPLOYERS FIRST REPORT TO DEPUTY COMMISSIONER OF ACCIDENT." This was filed on November 15, 1935. It sets forth the name of the employer and of the vessel upon which work was being performed, office address, name of insurance carrier, name, address and age of the injured employee, and the circumstances of the accident covering such questions as "Has he returned to work?" "Was medical attention authorized?" "Names of foremen?" "Extent of injury, etc." This notice was enclosed with a letter of transmittal to the Deputy Commissioner under date of November 12, 1935, stating that Form 202, First Notice of Accident, was enclosed, and proceeding then to say:

> "The foregoing notice pertains to a *claim* of G. Pletz against the SS. WEST PLANTER . . . . This claim arises out of an accident that occurred November 12th at Portland, Oregon, on board the SS. West Planter." (T. 238) (Italics ours.)

The next form was "ATTENDING PHYSICIAN'S REPORT." This form contains 19 questions to be answered by the attending physician, among which is an interrogatory as to the extent of the disability and an estimate of when he would be returned to work, and an explanation of the educational background of the attending physician. This report was dated November 19, 1935, and appears on pages 239 and 240 of the Apostles.

"NOTICE TO THE DEPUTY COMMISSIONER THAT PAYMENT OF COMPENSATION HAS BEGUN *WITHOUT* AWAITING AWARD" is another form required by the Commission, and it was filed with the Deputy Commissioner on November 26, 1935. This form gives notice of the name and address of the employer, and the name of the vessel, and place of accident, name and address of injured employee, date of accident, and states that "Compensation is to be paid to G. Pletz." (Tr. 241-2) This is followed by a computation of the "compensation rate." It shows that Pletz's earnings were $1109.82 for the preceding year, "divided by 42—average weekly wage 21.34 multiplied by 2/3—compensation rate, $14.23."

> "8. Compensation shall be payable from the 20th day of November, 1935, until notice is given the Deputy Commissioner that payment has been stopped or suspended." (T. 242)
>
> "9. Date of first payment Nov. 26, 1935." (T. 242)

On November 26, 1935, a letter of transmittal of this notice that compensation would be paid without awaiting award was mailed to the Deputy Commissioner. It is found on page 243 of the Transcript, and so far as is material herein, states as follows:

> "The foregoing notice pertains to the claim of G. Pletz against the SS. West Planter and/or McCormick Steamship Co. This man's disability began November 13th and eliminating the waiting period, compensation is payable from November 20th.

"We ascertain from the Longshoremen's Hall that this workman's earnings averaged $21.34 per week. This entitled him to compensation at $14.23 per week. We are paying him at this rate.

(Signed) David C. Pickett."

On December 4, 1935, Mr. Pickett wrote the following letter to the Deputy Commissioner, (T. 244):

"We have tendered compensation to Mr. Pletz on account of the injury which he received November 12, 1935, while employed on the SS West Planter, but he has refused to accept the same."

On January 10, 1936, the Deputy Commissioner wrote Mr. Pickett as follows, (T. 245):

"When claimant is finally discharged from treatment by the attending physician, kindly submit supplementary medical report with special reference to permanent partial disability.

"If complete or adequate information cannot be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited."

On January 11, 1936, the Deputy Commissioner's letter is answered by Mr. Pickett, stating (T. 246):

"On December 4, 1935, I addressed a communication to you stating that Mr. Pletz had refused to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act.

"*Up to the present time Mr. Pletz has not accepted compensation.*" (Italics ours.)

It is to be noted that there are no communications between the Deputy Commissioner and Mr. Pickett in reference to this claim from December 4, 1935,

to November 5, 1936. Pletz having been injured on the 12th of November, 1935, it will be seen that the Deputy Commissioner's inquiry came within the year. On November 5, 1936, the Deputy Commissioner wrote to Mr. Pickett the following letter, (T. 247):

> "This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise as to the present status of the matter."

Mr. Pickett answered this letter, but no mention is made of the fact that Pletz had not been accepting compensation or that continuing offers of payment of compensation were made. The letter is dated November 6, 1936, and is significant because it shows that Pletz was receiving medical aid from the insurance carrier, and that he had been recently submitted to a specialist for the purpose of seeing if an improvement of his physical condition could not be secured. The letter is as follows (T. 247-8):

> "I have your letter of November 5, 1936. This is to advise you that at the present time Mr. Pletz claims to be suffering from certain subjective symptoms. The doctors by whom I have had him examined and under whose treatment he has been have been unable to find any objective symptoms, and have advised me that he is not really disabled. Recently, however, I put him under the care of Dr. Leon Goldsmith with a request to Dr. Goldsmith to examine him thoroughly with the view of determining his true physical condition. I have not had a report from Dr. Goldsmith.
>
> (Signed) David C. Pickett."

The next proceeding before the Deputy Commissioner is a request for additional reports, under date of March 2, 1937, and is found on pages 248 and 249 of the Transcript. The letter is as follows:

> "Will you kindly refer to the case of G. Pletz injured on 11-12-35, while in the employ of McCormick Lbr. SS. West Planter, and furnish the following reports? We should be glad to be advised as to the status of the matter subsequent to your letter of Nov. 6, 1937.
>
> "If complete or adequate information cannot be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited."

The answer thereto is under date of Mt . 8, 1937, and is as follows, (T. 249, 250):

> "I have your inquiry of March 2, 1937, inquiring as to the status of this claim subsequent to our letter of November 6, 1936. I beg to state that this man still claims to be suffering from disability resulting from the accident. None of the doctors to whom I have sent him can verify his claims of disability. *From my conversation with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and to secure from me an agreement for perpetual medical care.*" (Italics ours.)

The next proceeding is a claim dated April 19, 1937 in which Pletz files a claim for compensation on one of the Commission's forms, entitled "EMPLOYEE'S CLAIM FOR COMPENSATION" and states the circumstances of the accident.

This claim was prepared or the form blanks filled out by Mr. Pickett, and transmitted to the Deputy Commissioner from Mr. Pickett's office. In connection with the filing of this claim, the following appears:

". . . . I was asking Mr. Pickett that I had better take the compensation, because it will take a long time until I can work. And Mr. Pickett says, 'You wait for a while, you might get a little better when it gets warmer.' So I did let it go another couple of months, and then I did come up and insist that I wanted compensation, and then Mr. Pickett told me I had to file a claim with Mr. Marshall.

Q. Now when was this, Gus?

A. Well, it was about a day before I seen you.

Q. Did you send a claim in?

A. Yes, Mr. Pickett in the office fixed it up for me.

Q. Wait a second,—this claim that you really sent in was sent in by our office, was it not?

A. No, it was sent in by Mr. Pickett.

MR. LORD: Is that right, Dave?

MR. PICKETT: It was made out for him by our girl and mailed by him." (T. 223)

On May 6, 1937, the insurance carrier for the employer filed with the Deputy Commissioner, on a prepared form a "NOTICE TO DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED." The reasons for filing the controversial are stated as follows:

"1. Because no payments of compensation were made in this claim and the claimant did not file a claim for compensation within one year after the date of the injury, as prescribed by subdivision (a), Section 13, of the Longshoremen's and Harbor Workers' Compensation Act.

"(a) Because the alleged disabilities do not result from the accident."
for such other reasons as may later appear." (T. 260)

There is also a Notice of Controversial shown on pages 261 and 262 of the Apostles, which is a reiteration of the reasons for resisting any further proceedings in connection with the claim.

The Apostles disclose what took place between Pletz, the claimant, and the representatives of the insurance carrier, and inasmuch as there are no contradictions to the testimony, the writer of this brief is of the opinion that certain facts can be assumed as being conclusively established as true:

1. That the representatives of the insurance carrier immediately commenced to look after Pletz by telling him that they would loan him money if he needed money, and this before compensation was due, (T. 218) and during the pendency of the claim did loan him money.

Subsequent to March 13, 1936, until July 23, 1937, interminable discussions, interviews and negotiations relating to the workman's disabilities and claim for compensation were carried on between the insurance carrier's attorney and the workman, and medical services were rendered without dissent during this period.

2. That every possible consideration was being shown Pletz both by the representatives of the insurance carrier and the attending physicians, and this treatment continued up until the 23d of July, 1937.

Pletz was taken to St. Vincent's Hospital from the place of the accident by the employer, (T. 212-213) He was confined to the hospital for about six weeks. Dr. Sabin was called in, as well as Dr. L. V. Belknap, (T. 213). After being in the hospital about six weeks he was sent to Dr. Harry C. Blair, who advised a surgical operation, (T. 213). Pletz submitted to this operation and was confined to the hospital from February 12 to March 13, 1936. (T. 213-14). The man was suffering from neurasthenia, (T. 214):

Medical treatment and advice was being given him continuously from his discharge from the hospital on March 13, 1936, to the date of the first hearing (July 23, 1937), (T. 214-15):

3. There were continued discussions between Mr. Pickett and Pletz regarding the payment of compensation, and the question of so-called third party liability, and these discussions continued between the parties long after November 12, 1936. There were discussions in relation to a lump sum settlement of the claim. (It is to be noted that under the Harbor Workers' Act with the approval of the Deputy Commissioner, a lump sum settlement may be made,—Sec. 14, Subd. (j).) The entire transcript of testimony discloses that Pletz was continually and persistently conferring with Mr. Pickett in relation to his claim, from March 14th forward, and that he had called on Mr. Pickett at his office frequently between the latter part of December, 1935, and February 13, 1936, (T. 218). Pletz's testi-

mony on page 220, previously quoted, is uncontradicted that Mr. Pickett—

> "was willing, he would rather make a settlement with me than pay me the compensation.
>
> Q. Now, by settlement, Gus?
>
> A. Well, he was going to give me a lump sum, but it should be final.
>
> Q. Final? A. Yes.
>
> Q. And did Mr. Picket tell you he couldn't do that?
>
> A. No, he said himself he would better like to settle it than pay me compensation." (T. 220)

Throughout the record it is shown that the money payments of compensation were never refused Pletz, and undoubtedly Pletz entertained the idea induced by the carrier's claim attorney, that he could have compensation at the rate of $14.23, to be accepted by him at any time he desired to take it, and long after November 12, 1936.

This is exemplified in the testimony of Pletz found on pages 221 and 222 of the Transcript.

The only conflict in the testimony is on an immaterial issue and that is whether or not Pletz was contemplating filing a suit against the ship to recover damages on account of unseaworthiness. Pletz claims that he never threatened to bring suit, that he knew that from the start, that he was informed that he had no personal claim against the vessel. Mr. Pickett claimed that Pletz had in view a right of action to recover indemnifying damages rather than compensation.

ARGUMENT

The doctrines of waiver and estoppel have uniformly been held applicable to acts of the type of the Harbor Workers' Act, and all substantial evidence in this case calls for the application of these doctrines.

Riverside Mills Co. vs. Parsons (Tenn.) 141 S. W. (2d) 895.

Harrison vs. McCarty, 13 A. 544.

Young v. Hoage, 90 F. (2d) 395.

American Mutual Liability Ins. Co. v. Hamilton, 145 Va. 391, 135 S.E. 21.

Vester Gas Range & Mfg. Co. v. Leonard, 146 Tenn. 665, 257 S.W. 395.

Smith v. Heine Safety Boiler Co., 119 Me. 553, 112 A. 516.

Curtis v. Slater Constr. Co., 194 Mich. 259, 160 N.W. 659.

Lindblom v. Employers' Liability Assur. Corp., 88 Mont. 488, 295 P. 1007.

Crane Enamelware Co. v. Dotson, 152 Tenn. 401, 277 S.W. 902.

Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P. 413.

Halverhout v. Southwestern Mill Co., 97 Kans. 484, 155 P. 916.

The workmen's compensation acts of different states are dissimilar in operation. The acts of many states set up a quasi-judicial tribunal and make provision that practically every step taken by the injured

workman is subject to the determination of a public official. The Commission makes rulings and orders which have the effect of official determinations, but as far as the claimant undertaking to negotiate with the Commission with respect to his disabilities, he is unable to do so. The courts, in construing such workmen's compensation acts, have in many cases held that members of the Commission are acting under statutory authority and a compliance with the statute is mandatory and jurisdictional, and any dealings with the claimant outside of the provisions of the statute are extra-jurisdictional. Consequently the filing of a claim within time limits has frequently been held jurisdictional, and it is expressly held that the doctrines of estoppel and waiver cannot be applied to the acts of the officials whose duty it is to administer such acts. Of course, it is a familiar principle of law that the doctrine of estoppel and waiver does not apply to the acts of public officials. Some courts, however, have refused to treat this type of act any different than if the Act was an insurance coverage with a private insurance corporation, and hence construe the provisions relating to the notice of injury and the filing of claims the same as such provisions would be construed if found in any accident insurance policy.

The decisions construing the state acts are found in an annotation in 78 A.L.R., 1306 et seq.

There is another set of workmen's compensation acts which provide that an employer shall secure a policy of insurance against accidental injury to his

employees with an insurance company. Provision is made that in event of any dispute between the injured employee and the insurance carrier, the dispute shall be submitted to a commissioner, who is a public functionary. Under such acts the employee and the agents of the insurance carrier may adjust their differences to suit their own conveniences, and as long as there is no dispute there is no resort to the commissioner.

The procedure regarding the proof of claim for an injured employee under the Harbor Workers' Compensation Act is entirely different than under the type of act where a quasi judicial tribunal administers the entire proceedings relating to the claim. While the Act is administered by public officials, i. e., the U. S. Employees Compensation Commission and a deputy commissioner who has charge of the administration of the Act in a geographical district, yet the duties of the Commission in general do not involve the disbursement of public funds, nor is there any special fund created by the terms of the Act with which to pay claimants benefits for disabilities; nor is there any procedure for the collection of premiums from employers, or for the creation of a fund, so the construction of acts containing analogous provisions to the Oregon and Washington Acts, for example, are of no aid to this Court in determining the liability in this case.

This is well illustrated in the case of *Rohde v. State Industrial Accident Commission*, 108 Ore. 426, 217 P. 627, where an effort was made to file a claim for com-

pensation benefits several years after the three-month limitation fixed in the Act for filing claims had expired, on the grounds that Rohde had, by mistake of law, pursued a wrong remedy, and the representations made by him to the Commission prior to the expiration of three months were insufficient upon which to predicate the claim. Says the Court:

> "Some precedents are cited on behalf of the claimant from Michigan, New Hampshire, Maine, and Illinois on the subject of waiver, with the deduction that, because the Commission acknowledged receipt of the paper by means of the postal card, it waived the filing of a proper application. *In all of those states the employer is required to pay compensation directly to the injured employee or to secure the same by insurance at the employer's expense.* Under those statutes it is a question directly between the employee and his employer. The latter, being in propria persona, can of course waive any formality required by the statute, as it is a personal right, ..." (Italics ours.)

We need not pursue such acts further because it is apparent there is a distinguishing feature in the statutes where the employer or insurance carrier is charged with the furnishing of medical services, hospitalization and the payment of fixed sums of money, as opposed to those statutes which provide for the administration of a fund collected from all employers, and which is placed in a segregated fund, from which claims are not paid until proven by the claimant as the result of a claim presented and filed, and doctors and hospital services are furnished by the Commission.

There are but few states where there are similar statutes. It has been said by the United States courts that the Harbor Workers' Compensation Act was borrowed from the Compensation Act of New York, and that the decisions of that state, construing the act, are to be accorded the usual binding force of borrowed statutes.

Consequently, in consideration of this case, the decisions construing statutes affected with the disbursement of a segregated fund should not be considered of any binding force because in those cases there are no dealings or negotiations between the claimant and the commission which could give rise to the application of the defenses of waiver and estoppel. This is the *rationale* of the decisions construing such statutes and in the Rohde case it is pointed out that the doctrines of estoppel and waiver do not apply to public officers, and hence the discussions between members of the Commission or its employees and the claimant were in no sense binding, nor could they arise to the dignity of an estoppel. That rule does not apply in cases where the claimant deals and negotiates directly with the employer or his insurance carrier regarding the benefits which he is to receive, and the defenses of estoppel and waiver apply to their fullest extent. Therefore, in the consideration of this case it is important that consideration be given to the conduct of the claimant and the insurer regarding the claim, and we think it abundantly proved by the statement of facts in this case and the findings of the district court and practi-

cally adopted by the appellate court, that the conduct of the parties gave rise to the application of the doctrine of waiver or estoppel so far as any claim may be made that a formal claim was not filed within the period of one year from the date of the injury.

The filing of a claim with the Deputy Commissioner becomes necessary only where there is a controversy between the insurer and the employee, and the rights of the injured employee to receive the compensation is denied by the insurance carrier. The right to compensation is not predicated upon the filing of a claim by the injured employee. The necessity of filing a claim within the year arises only in cases where the employer has no knowledge of the injury, or in cases where a question might arise that the tort was of non-maritime origin, and such like instances, but in instances where the employer has knowledge of the accident, and notifies the Deputy Commissioner of the accident, and tenders compensation, then there is no occasion on the part of the injured employee to file a claim.

Now in this case the Deputy Commissioner was given notice that compensation was being paid Pletz without awaiting an award. Here we have dealings within a few hours after the accident, between the employee and the insurance carrier. Under Section 14 it was the mandatory duty of the employer to pay "promptly and directly to the person entitled thereto without an award, except where liability to pay compensation is controverted by the employer."

There is nothing in the Act, as far as the writer has been able to find, that defines the term 'award' or makes any provision for the making of an award by the Deputy Commissioner. Section 19 (a) gives the Commissioner full authority to hear and determine all questions in respect to claims filed by the claimant, and presumably this is the award referred to in Section 14, but it is difficult to understand the necessity of making a claim, except where the claimant desires some different action on the part of the insurance carrier, and tries to enforce what he may conceive to be his rights, that he is entitled to under the compensation act which will not be accorded him by the insurance carrier.

For instance, in this particular claim, the insurance carrier was obligated to pay compensation without any action on the part of either the claimant or the commissioner, and it was willing to do so. Claimant was of the opinion that the amount tendered him as compensation was less than he was entitled to receive under the Act. He could have at this instance filed a claim and had this question determined, or he could go on and accept the compensation and when the carrier stopped paying him compensation he could have filed a claim within one year from the date of the last payment. The point is that it was the duty of the carrier to pay him compensation, and if he does not accept the money, that does not say that he may not subsequently come along and claim it. It may be that Pletz did not care to have the money in his hands and

preferred to let it accumulate in the hands of the insurance carrier, and I think all that can be said in this case is that the compensation at the rate computed has accumulated in the hands of the carrier.

It is noticed that the carrier never filed a controversial. The letter of December 4, 1935, set out on page 7 of this brief, is not a controversial. All it says is that "We have tendered compensation to Mr. Pletz but he has refused to accept the same." This letter was not notice to the Deputy Commissioner that a formal controversial was being filed by the insurance carrier. Under Section 14 (c) and (d) *a formal notice on a form prescribed by the Commission* that compensation has either been suspended or the right to compensation has been controverted *was necessary.*

The fact of the matter was that the claim attorneys for the insurance carrier expected that Mr. Pletz would sooner or later accept the compensation. This assertion is corroborated by the letter of January 11, 1936, where Mr. Picket uses the following language, "Up to the present time Mr. Pletz has not accepted compensation." (T. 246)

On pages 259-260 of the Apostles is shown a sample of the form that is required to be filed. If payments were suspended or compensation was controverted, it was absolutely essential that this notice be given, and on a form prescribed by the Commission. This, then, would start the machinery in operation for the protection of the claimant's rights. After such notice had

been filed, it then became the duty to give the claimant notice that compensation would not be paid, and if claimant had any rights, to come forward and assert them before the Commission. That is the procedure contemplated by Section 14 (h). If the formal notice is not filed, there is nothing to put the machinery in operation, and hence there is no notice to the claimant or to the Deputy Commissioner that compensation will not be paid.

At any time that the insurance carrier deemed that Pletz had recovered, it was its duty, under this Act, to have notified the Deputy Commissioner that the last payment of compensation had been made, and the rating of lost function or disability rating had been made, and the amount of it.

Here we have a case where there was an injury to a member which could give rise to a rating for permanent partial disability. Under Section 14 (g) it became the absolute duty of the insurance carrier, if it believed that Pletz had recovered, to have filed such a notice with the Deputy Commissioner within sixteen days after the final payment of compensation. The giving of this notice and the notice of suspension of payments, or notice of controversial is essential under this Act on the part of the employer or his insurance carrier, if payment of compensation has commenced without the making of an award.

Now, under the uncontroverted evidence in this case, the claim attorneys, instead of taking this af-

firmative action, preferred to discuss matters with Pletz. We find the evidence shows beyond peradventure of doubt that before the compensation was due the claim attorneys were offering to loan Pletz money, that after he was released from the hospital during the month of December, 1935, he called at the office of one of the claim attorneys and discussed with him the question of the payment of compensation, and compensation was tendered him. It had previously been tendered him in the hospital. A statement relating to the circumstances of the accident had been taken and Pletz was coming to the claim attorney's office once or twice a week. Long before the period of one year expired discussions were going on relating to settlement of the case in one lump sum, and Mr. Pletz was discussing the question whether, if such settlement was made, there would be a provision for medical care in the future. In other words, there has been a course of dealing going on between the parties almost continuously for months, and long after the expiration of one year after the accident these proposed settlements were being discussed.

So it is very clear that neither the insurance carrier, Pletz nor the Deputy Commissioner had taken any steps towards preventing the insurance carrier from paying compensation "directly to the person entitled thereto without an award." Claimant and the insurance carrier were treating that the compensation was due and there was no objection to paying it, and under this Act, it was certainly the duty, if the carrier

was not intending to pay the compensation and does not intend to pay it, to have taken affirmative action, and if it does not take affirmative action the compensation accumulates to the credit of the claimant. The Compensation Act contemplates that if the insurance carrier knows about the accident and has given notice of the accident, it shall take the affirmative action of paying compensation without any action on the part of the injured employee, and if it does not do this, it cannot assert that a claim for compensation has not been filed. The only necessity for filing a claim for compensation on the part of the injured employee is to accomplish something that the insurance carrier is not willing to do. So compensation in this case accumulated until the 6th day of May, 1937, the date upon which the insurance carrier filed a controversial, and thereafter until a hearing is had by Mr. Marshall and an award made by him.

The claim attorney and the claimant were in continuous conference. Apparently Mr. Pletz was suffering from shock and was continuously in attendance upon the claim attorney's office, asking this and expecting that. There were discussions about the amount of compensation that Mr. Pletz was entitled to receive, how it was computed, whether the books of the company were authentic. There were discussions about lump sum settlements which the claim attorney was powerless to grant without the approval of the Deputy Commissioner and the Commission. These were idle discussions but they were had. It is probable that

the lump sum settlement was something that the claim attorneys desired in order to rid themselves of the importunities of the claimant. The perpetual "medical care" seemed to be a stumbling block to any action being taken, but it was not insurmountable. Such dealings between the claimant and the insurance carrier amount to estoppel.

There is not a single decision under Acts similar to the Harbor Workers' Act that does not recognize that the doctrine of estoppel can be and will be applied. It is true that many of the cases use language which would seem to rule out this idea, but every decision that the writer has read has recognized that the doctrine of estoppel may be applied where the obligations to pay compensation are matters of private adjustment between the claimant and the carrier, subject to being reviewed in event of dissatisfaction by a Board. It is true that in many of the cases the courts have found that the claimed acts do not amount to an estoppel, but all the cases do hold that in a proper case the defense of estoppel will be applied.

This Act was under consideration in the case of *Young v. Hoage,* 90 F. (2d) 395, referred to supra. In that case no claim was filed, or thought of being filed, for over two years after the claimed accident. There were no medical services rendered to the employee, and no recognition of the claim in any way on the part of the employer or the insurance carrier. The claimant died as the result of chronic myocarditis. Claimant was the widow of an employee of a road

contractor who mashed two fingers on April 23, 1933, and lost no time from his work. On May 2d he died and death was caused from heart disease. On May 17, 1933, a letter was written notifying the deputy commissioner of the death of the employee, giving information to the effect that he injured two fingers "in line of duty." A copy of the letter was sent to the employer. No claim for compensation was made and the matter was not further discussed until October 4, 1935, when a letter was written adverting to the fact that now the claimant was in possession of information that the cause of death was connected with the injury to the fingers. Thereupon a claim was filed over two years after the accident, and the claim was rejected on the grounds that the claim had not been filed within the year after the date of the accident. The claim was rejected by the deputy commissioner and an appeal was taken. The court then goes on and quotes from the sections of the compensation act and ends up by saying that the correspondence quoted did not amount to the notice of a claim or the filing of a claim. The court reviews a number of cases and comes to the conclusion that the claim had not been filed within the time, and had outlawed.

But the court observed: "In that view the objection made here is jurisdictional, and here there are no equities which we can properly consider. . . . There is no intimation of entrapment or surprise." These last statements are very significant and intimate beyond peradventure of doubt that the court would

apply the doctrine of estoppel to the construction of the Harbor Workers' Act in event circumstances and facts warranted the application of that principle.

There are facts which stick out starkly and it must bring a blush of shame to esteemed counsel to urge the setting aside of the District Court's decree in this case. I just wonder how the insurance carrier can reconcile the refusal to pay this claim with ethical conduct on its part.

Take, for instance, the statement of Mr. Pickett to the effect that the medical reports show that this man should not be disabled for more than six weeks, and that in the month of August, 1936, he had thought for several months that Pletz had no disabling injury and he could just as well go back to work. Yet for months afterwards, and long after the expiration of the time for filing the claim, he was still talking about making a lump sum settlement, and asking the man what he would take. In other words he was just being strung along. It is very obvious that Mr. Pickett sought to arouse in the claimant's mind that he was going to get a lump sum settlement on account of his claim, sooner or later, and that he would get it as a result of the negotiations and discussions that he was carrying on with Mr. Pickett.

Again, Mr. Pickett's answer to Mr. Marshall's letter of November 5, 1936, which was written a few days before the expiration of the time within which to file a claim, is a monumental piece of cupidity. Mr. Mar-

shall says (T. 247) that the injured man had refused to accept compensation and asked for information as to the present status of the matter. Mr. Pickett's answer, found on page 247, does not say that the man is still refusing to accept compensation. He says the doctors have advised him that they are unable to find any objective symptoms, and that he "is not really disabled," and to reassure the Deputy Commissioner that the claim is in good standing, he goes on to say that he had placed him under the care of Dr. Goldsmith with a view of determining his true physical condition, and added that as yet he had not had a report from the doctor. The whole course of dealing between Mr. Pickett and Mr. Pletz, after Pletz had not accepted the compensation draft, was designed to overreach Pletz and string him along until his claim outlawed, and after it outlawed by limitation of time, Mr. Pickett was afraid to face the consequences, and then continued to string this poor deluded fellow along about making lump sum settlements with him.

Characteristic of the bad faith evidenced in the handling of this claim is to be found in the testimony of Dr. Paul B. Firth (page 121 of the Transcript). Pletz wanted to go to this man to see if chiropractic treatments would not be of benefit to him. This occurred in July, 1936, and Dr. Firth's services were not paid for. When Firth called upon Mr. Pickett to make payment, he was told that the insurance company had not made a settlement with Pletz and not to worry as the claim would be paid. In November he

again called Mr. Pickett and this time was requested to send an itemized statement. Dr. Firth stated that during all the months Mr. Pickett kept telling him that the case had not been *settled*, and that as soon as the case was settled he would pay the obligation to Firth. (T. 124) Upon further demand being made he was informed that the services were not satisfactory. He was never told that his claim would not be paid because the claim had outlawed. Eventually he sued Mr. Pickett to recover for the services for which Mr. Pickett had promised to pay, and of course he lost because he had sued the agent of a known and disclosed principal.

Possibly a true solution of the situation is to be gleaned from Mr. Pickett's testimony found on pages 181, 2, 3 of the Apostles:

> "Mr. Pickett: Yes, it was. I should have written you a report on that, too, Mr. Marshall. There is one question Bill asked me the last time I was on that I don't think the answer was complete in it.
>
> Q. What is that?
>
> A. That is what interest I had in the case from a medical standpoint or otherwise when Mr. Pletz refused compensation, or the statute of limitations had run. Now we do have an interest there that I think to clear the whole thing I think possibly should be explained.
>
> Q. I don't quite understand what you refer to.
>
> A. It is a question you asked.
>
> Q. As to the payment of the doctor bills?
>
> A. No, your question was: Why was I interested in the case when he had refused compensation, or after the statute of limitations had run?

We do not have an interest to this extent that as soon as that accident occurred we are faced with three possible claims: one is a claim under the Longshoremen's and Harbor Workers' Act; the other is a possible third party claim; and the other is a possible suit against the employer in spite of the Act. Now it just happens that I represented the carriers that would have had to defend each one of these claims that he was presenting and he had determined to make a liability claim, and had been asking for a lump sum settlement, and if suit had been filed in either type of those liability claims I would have been involved in the defense of it. And therefore I was interested in the claim that he was pressing, and I was interested in the claim after the statute had run, not may be as a compensation claim, but as a liability claim. It was up to me to keep in touch with him as long as there was a danger of either of those claims being pressed.

Q. In other words, you figured there was a two year statute of limitations in respect to any claim he might make as to liability, either as a third party claim or as a direct claim against the McCormick Steamship Company?

A. There might be, yes, but at any rate we would have them to defend if he filed them.

Q. So that is why then you did continue to discuss it with him?

A. I was bound to discuss it with him as long as he was pressing any type of claim against any insurance company I represented.

Q. And you kept on discussing it with him until the controversial was filed, didn't you?

A. Yes, and until he had settled upon one claim he was going to press, I thought he had settled upon the liability claim long before that. As a matter of fact, he told me so and then when he came in and filed the formal claim then he was presenting a claim for compensation."

Yet he knew that any claim against the McCormick Steamship Company or third party claim was nothing more than such stuff as dreams are made on.

In the face of this record was there anything else for the trial judge to do but to say that there was no substantial or credible evidence that Pletz had not been imposed upon, and the company, by its dealings, should be estopped from asserting the bar of the statute of limitations?

Failure to file controversial as required by Section 14, together with the dealings between the claimant and the carrier, and failure to advise the Deputy Commissioner, constitute a waiver of notice of claim and holding of compensation for claimant's use.

Mackie v. School District, 234 Mich. 689, 209 N.W. 840.

Chelli v. American Boston Mfg. Co., 288 Mich. 441, 285 N.W. 14.

This was the view adopted by the Court of Appeals. The Court points out that Section 13-A of the Act applies only to cases where a controversial has been filed by the employer and that so long as the employer does not file a controversial there is no occasion for the employee to file a claim in a case like the one under consideration where the employer is not controverting the right of the employee to receive compensation, and is making a tender of compensation. This was plain

because under Section 14 of the Act it becomes the duty of the employer, when he has knowledge of the injury, to pay compensation on the fourteenth day thereafter, and upon the first payment of compensation the employer shall notify the Deputy Commissioner of the fact that payment has been made. It will be noticed by claimant's Exhibit 2 that the employer's report was filed on November 15, 1935, which was just three days after the accident, and it was stated that the employer had knowledge of the injury at the time and that medical attention by Dr. Belknap was authorized. This was transmitted by a letter of the employer's and carrier's attorney under date of November 18, 1935, and this was followed by attending physician's report on a form blank furnished by the Deputy Commissioner. If the employer or insurance carrier desires to reject the claim or if he decides the employee's disability has become stationary under subdivisions (c) and (d), it becomes the duty of the employer to notify the Deputy Commissioner that payment has been suspended or controverted.

The offer to pay compensation was purely voluntary on the part of the insurance carrier; that is, it was complying with statutory requirements which it had assumed. It had a right, if it cared to exercise it, to have filed a controversial, or reject the claim from the start. It may have been bad in principle for it to do so, but it could. Compensation was offered to be paid long after the expiration of one year from the date of the injury. This testimony has already

been referred to in our statement.

The claim attorney filled out Form 206 giving the Deputy Commissioner notice that payment of compensation to Pletz without an award had begun, and the accompanying notice, dated November 26, 1936 (T. 243) says: "We are paying him at this rate." The letter of December 4 states: "We have tendered compensation to Mr. Pletz," and on January 11, 1936, "Up to the present time Mr. Pletz has not accepted compensation." (T. 244) The Deputy Commissioner's letter of November 5, 1936, (T. 247) addressed to the claim attorney, is as follows:

> "This is the case in which you advised the injured man had refused to accept compensation in December, 1935. For completion of our file to date kindly advise as to the present status of the matter."

The answer, (T. 247-8) states that "Pletz claims to be suffering from certain subjective symptoms" and the doctors have advised "that he is not really disabled," and that he had put him under the care of another doctor who had not made a report. This reply did not give the information requested, as it omitted to give the information as to whether compensation was being paid Pletz. This was six days before one year had passed since the accident.

On March 2, 1937, the Deputy Commissioner forwarded a letter to the claim attorney on a form blank requesting information as to the status of the matter subsequent to the letter of November 6, 1936, and

with a further request that if information cannot be given on printed blanks, "kindly report by letter." (T. 248-9) On March 8, 1937, (T. 249-50) is the reply in which information is given that Pletz still claims to be suffering from disabilities, and "none of the doctors to whom I have sent him can verify his claim of disability," and he went on to say that "from my conversations with Mr. Pletz his chief aim regarding the claim seems to be to effect a lump sum settlement and secure from me an agreement for perpetual medical care."

Now it will thus be seen that the insurance carrier at no stage of the proceedings on the claim before one year from the date of the injury gave the Deputy Commissioner any information that compensation was not being paid, but on the contrary he was led to believe until the claim for compensation was filed on April 19, 1937, that compensation was being paid. The letter of March 8, 1937 does not give any definite information that bi-monthly payments of compensation were not being made. The intimation of the letter of March 8, 1937, is that Pletz was feigning disability in order to secure a lump sum settlement and an agreement for medical care on account of injuries he had sustained. Now, of course the administration of the Act is under the U. S. Employees Compensation Commission, (Section 39), which is authorized to make rules and regulations. By Section 27 of the Act the Deputy Commissioner is given power "to do all things conformable to law which may be necessary to enable him effective-

ly to discharge the duties of his office," and by Section 22, as amended, the Commissioner may, upon his own initiative "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 19," and upon such investigation he has authority to take such steps in respect to the claim, or issue such orders as may be for the interest of the claimant or the carrier.

Under Section 14 it was the duty of the insurance carrier to pay the first installment at a fixed time after notice or knowledge of the injury, and it is further provided that compensation shall be thereafter paid semi-monthly except where the Deputy Commissioner determines otherwise. Under subdivision (d) of this section, if the employer did not intend to pay compensation, it was the duty of the employer to controvert the right to compensation by filing a written controversial with the Deputy Commissioner. This puts in motion the procedure which protects the claimant. He is given notice and by the filing of a claim a hearing is had. This the employer never did, and consequently the necessity of Pletz filing a claim for compensation did not come into existence or become consummate until such action was taken. In other words, the right to controvert payment of compensation by its own action was waived because the moment that the Deputy Commissioner had notice that the claim was going to be controverted, it became his duty to

notify the injured workman that compensation would not be paid, and thereupon Pletz had one year within which to file a claim upon which a hearing would be had, in accordance with the prescribed method of procedure. In other words, the Deputy Commissioner was led to believe that compensation was being paid and was never in fact notified that it was not being paid until April 19, 1937, or more than a year and five months after the injury had occurred.

The Court of Appeals took the view that the employer had either waived or dispensed with the filing of a claim by its own voluntary action, and by failing to file a controversial the time for the claimant to file a claim had not begun to run. While the Court cites no authorities to sustain its position, the cases cited above in the heading, construing the Michigan Act, clearly show that such construction is not without judicial precedent.

Clearly the only charitable view that can be taken of the matter is that the compensation was being held by the carrier for Pletz's use. On the other hand, it must not be lost sight of that the District Court made findings that did not exculpate the claim attorney, (T. 53) and the remarks of the court in rendering its opinion (T. 38), "Now there are some circumstances that are more disturbing than usual, and I feel that it is my duty, and justice demands, that I set aside the order, . . .," and the Court (Hon. Claude McColloch, Esq.) was charitable enough to suggest to counsel,

"but what findings I should or may make, or what expressions I shall put in the record other than what I am saying here . . .," characterize the dealings as designed to take advantage of a "man being to a degree, anyhow, a mental case, and that is established to my satisfaction, ..." (T. 37) but some keen legal mind in the "home office" discovered there might be a legal "out" under the terms of Section 13, and the impasse that developed in Kobilkin's case, 103 F. (2d) 667, 309 U.S. 619, which was affirmed by this Court without opinion, the Court being equally divided, and hence the rejection of the claim.

Rendering of medical treatment is generally considered payment of compensation.

Industrial Comm. v. Globe Ind. Co., 218 P. 910-11.

Royal Ind. Co. v. Industrial Comm., 293 P. 342.

Thomas v. Baker Lockwood Mfg. Co., 163 S.W. (2d) 117.

Compensation is defined in Subdivision 12 of Section 2 of the Act as "the money allowance payable to an employee . . . as provided for in this Act, and includes funeral benefits provided therein."

It is difficult to see how this definition in fact excludes the usual rule that medical benefits are as much compensation as the money that is paid by way of indemnity payments.

It developed on the hearing that he was still undergoing treatment by the insurance carrier's physicians, and was still receiving regular treatment from the insurance carrier's physicians on the 23d day of July, 1937, which was the day upon which the hearing was taking place. This is shown on pages 220 and 221 of the Transcript. This evidence stands uncontradicted.

The Harbor Workers' Act provides in Section 7(a). that the insurance carrier shall render this service, and provides that in event it is not rendered, the employee may contract it himself and the same shall be paid for by the insurance carrier. It also provides that the doctor for the employer shall furnish a report to the Deputy Commissioner within twenty days.

CONCLUSION

It is to be noted that Mr. Marshall did not make any specific findings. We have reference to the failure to make findings upon the effect of the negotiations between the parties, and the conduct of the parties attempting to reach a settlement, as tending to create a waiver of the filing of the formal claim by Pletz. Mr. Marshall followed a minority rule that the filing of a claim is jurisdictional, regardless of the conduct of the parties. The theory of these decisions is that compensation paid employees injured in industry is entirely unknown to the common law, and if there is a limit fixed as the time for the injured em-

ployee to act, the limitation controls the right. In other words, the time limit placed for filing a claim is placed upon the same plane by these courts and certainly in this case as found by two courts, the failure to file a controversial after payments had been tendered and to deal with the claimant on the basis that the claim was alive long after the one year limitation had expired and to make out the claim blank and mail it to the Deputy Commissioneh and to render medical service after the one year period constituted a waiver to claim that the one year limitation controlled.

BEN ANDERSON,
T. WALTER GILLARD,
WM. P. LORD,
Attorneys for Respondent.

pp. 1, 4-7

SUPREME COURT OF THE UNITED STATES.

No. 93.—October Term, 1942.

Wm. A. Marshall, Deputy Commissioner, 14th Compensation District, U. S. Employees Compensation Commission, et al., Petitioners,
vs.
G. Pletz.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 4, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The importance of questions presented in this case in the administration of the Longshoremen's and Harbor Workers' Compensation Act,[1] as well as a conflict of decision,[2] impelled us to grant certiorari.

The respondent, a longshoreman and maritime worker employed by the petitioner McCormick Steamship Company in loading a steamship, was injured November 12, 1935. He filed a claim before the petitioner Marshall, a deputy commissioner, April 20, 1937. The petitioner Firemen's Fund Insurance Company, which insured the employer against liability arising under the Act, appeared at the first hearing set by the deputy commissioner and objected that the claim was untimely filed.[3] The respondent asserted that the insurer had, by conduct and negotiations with him, waived the right to object to the claim on the ground stated. After hearing witnesses the deputy commissioner made findings of fact on which he based ultimate findings that the claim was not filed within one year after the injury and that the respondent

[1] March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. c. 18.

[2] Fulton v. Hoage, 77 F. 2d 110.

[3] § 13 of the Act (33 U. S. C. 913) provides: (a) "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment"; and (b) that the bar shall not be effective unless objection to the failure to file is made "at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." There are other exceptions in paragraphs (c) and (d) which are here irrelevant.

had not been misled or overreached by the employer or the insurance carrier, and dismissed the claim.

The respondent filed his bill in the District Court praying that the order be set aside as "not in accordance with law".[4] A motion to dismiss was filed and, after hearing, the court remanded the case to the deputy commissioner with instructions to make findings of fact upon all the issues involved and with leave to consider all the evidence already taken and any other further evidence which might be offered as a basis for such findings. Further evidence was taken, the deputy commissioner made detailed findings of fact, and again concluded that neither the employer nor the insurance carrier had misled the respondent and that neither the carrier nor the employer had waived, or estopped themselves to rely upon, the limitation set by the statute. Thereupon the respondent supplemented his bill and the petitioners moved to dismiss. The court heard the case upon the record certified by the deputy commissioner, but upon that record made its own independent findings of fact. Its conclusions, based on its findings, were that the insurance carrier was estopped to assert that the claim was not timely filed and had waived any defense on that ground. The court set aside the orders of the deputy commissioner and directed him to enter a further order rejecting the objections to the claim and holding it to be in all respects valid, and to proceed to ascertain the amount of compensation due the respondent.

The insurance carrier, the employer, and the deputy commissioner appealed to the Circuit Court of Appeals. That court affirmed the decision of the District Court, one judge dissenting.[5]

On the day of his injury respondent was sent to a hospital by the employer. He remained there until about Christmas 1935. A representative of the insurer called on him there, received a statement of his injury, and, within the time required by the statute, tendered him a check for the first installment of compensation due him, calculated according to his weekly earnings as nearly as the same could be ascertained from employment records. Respondent refused the check on the ground that it was not for as much as his earnings justified. It was explained to him that any deficiency could be adjusted as soon as the insurer or he could ascertain the facts more accurately. After leaving the

[4] As permitted by § 21(b) of the Act, 33 U. S. C. 921(b).

[5] 127 F. 2d 104.

hospital respondent called on the attorney of the insurer, was again tendered payment of compensation, and again refused it on the ground that it was inadequate. At that time the insurer had some supplementary information and, as a result, advised respondent that it was ready to pay him compensation at a rate slightly in excess of that originally offered.

After refusing compensation, the respondent consulted an attorney who advised him that he had a cause of action against his employer for damages, notwithstanding the provisions of the Compensation Act. He subsequently told the insurer's attorney that he had been so advised.

The respondent's disability necessitated a return to the hospital in February 1936. While there his present counsel saw him, advised him that he had no valid claims against any third party or his employer and that he ought to take compensation. On leaving the hospital respondent continued to receive medical aid which was furnished by the insurer as was all medical care theretofore.

Respondent repeatedly called upon the insurer's attorney who consistently advised him that he ought to accept compensation. There is dispute as to who broached the subject of a lump sum settlement in these conversations. Respondent says the attorney did. The latter insists that the respondent demanded such a settlement; that he explained that no such settlement could be made under the statute until all disability had terminated and the consent of the deputy commissioner had been secured. It seems to be agreed that the respondent repeatedly said he wanted a lump sum settlement with medical care for the indefinite future and it appears that the attorney insisted that no such settlement could be made.

Sometime in the summer of 1936 the respondent again discussed his case with his present counsel and was again advised that he should accept compensation. There is credible evidence that the respondent called on the deputy commissioner within a year of his injury, was informed that if the amount of compensation tendered him was not the proper amount this could easily be adjusted by reference to the rolls at the employment office and that he then told the deputy commissioner a lawyer had advised him he could disregard the compensation act and bring an action to recover for his injuries. Respondent insisted, however, that this conversation took place after the year had expired.

The employer, or the insurer, promptly notified the deputy commissioner of the injury, that medical treatment was being furnished and compensation would be paid. Early in December of 1935 the insurer wrote the deputy commissioner that respondent had refused to accept compensation. In answer to an inquiry of the deputy commissioner, the insurer repeated this information in a letter dated January 10, 1936. There was no further correspondence in the matter until November 4, 1937, when the deputy commissioner inquired regarding the status of the case and was advised by the insurer's attorney that the respondent still claimed a disability, the existence of which the attorney doubted, but that respondent was receiving medical care, and seemed more interested in a lump sum settlement and perpetual medical care than in receiving compensation.

There seems to be no doubt that respondent and insurer's attorney talked repeatedly about the respondent's physical condition and the disposition of his case. There would seem to be little doubt on the evidence that he was repeatedly tendered compensation and refused it.

These are the facts in broad outline. It is unnecessary to recite the evidence in detail. What has been said indicates that issues of fact were presented and that there was substantial evidence to support the findings of the deputy commissioner.

First. The findings of the deputy commissioner supported his order. The District Court could not have set aside the order without retrying the issues of fact and making new and independent findings based upon its own appraisal of the evidence. But, under the overwhelming weight of authority in this and in the lower federal courts, the statute granted no power to the District Court to try these issues *de novo*.[4]

Second. The Circuit Court of Appeals, in affirming the District Court's judgment, did not rely upon that court's resolution of the issues of fact raised before the deputy commissioner. It based its decision on a matter of law. In the light of the uncontradicted fact that the insurance carrier had tendered compensation and had kept its tender good down to within less than a year before the filing of respondent's claim, the majority of the court

[4] Crowell v. Benson, 285 U. S. 22, 46, 66-72; So. Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 257. The cases in the lower courts are collected in 33 U. S. C. A. § 921, Note 3, pp. 216-218.

concluded that a tender of compensation was the equivalent of payment of compensation without an award within the intent and meaning of § 13(a) of the statute.[7] It found support for its view in the provisions of § 14 of the Act,[8] which require an employer or insurer who denies liability to file with the deputy commissioner a notice of controversy so as to bring on the question of liability for decision.

We think this construction of the Act inadmissible. Tender is not payment. The insurer at no time denied liability but continuously admitted it and expressed its desire to pay compensation. Laying aside, as the Circuit Court of Appeals properly did, questions of waiver and estoppel, there was nothing to prevent the respondent's filing his claim as the Act contemplates[9] if the insurer neglected to pay compensation. If he refused to accept payment and refrained from filing a claim, whether because he believed he had a cause of action against a third party or against his employer, or for any other reason, he was none the less bound to present his claim within the time fixed by the statute. The fact that the insurer was willing to pay compensation, which he refused, does not bring him within the exception stated in § 13(a).

Third. At the argument at our bar it was suggested that the judgment below might be sustained on another ground, namely, that the furnishing of medical care to the respondent up to a time well within a year of the presentation of his claim was payment of compensation within the meaning of § 13(a). On this theory it was urged that the one year period within which a claim must be filed would run from the date of the last rendition of medical care.

At the insistence of respondent's counsel, the deputy commissioner took an opposite view. While he denied compensation in the form of money payments to the respondent, he ordered the continuance of medical care. This was upon the theory that the Act treats the employer's obligations to pay compensation and to render medical aid as independent.

Although the point is raised for the first time in this court, if we find it meritorious we may consider it as supporting the judgment below.[10] We hold, however, that the furnishing of medical

[7] *Supra*, Note 3.

[8] 33 U. S. C. § 914.

[9] 33 U. S. C. 914(h), 919(a) (c).

[10] Langnes v. Green, 282 U. S. 531, 536, and authorities cited.

aid is not the "payment of compensation" mentioned in § 13(a). Section 2 of the Act[11] is devoted to definitions, one of which is: "(12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein."

Section 6 provides "(a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in §7 of this chapter." The benefits covered in § 7 are the medical services which the employer is bound to furnish, but that section significantly provides that, if the employe refuses to submit to medical treatment, the deputy commissioner may, by order, "suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal." Here compensation is contrasted with medical aid.

Section 8 is entitled "Compensation for disability". The section deals solely with money compensation.

Section 10 states that "except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation" . . .

Section 14 deals throughout with what it terms "compensation". All of its provisions have to do with the periodic money payments to be made to the injured employe and make no reference to medical care.

Section 4 of the Act, it is true, refers "to the compensation payable under §§ 7-8-9". It may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term "compensation". In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employe anything on account of such care. Only if the employer and the insurer omit to furnish such care can the employe procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.

---

[11] The sections referred to in the following discussion are found in 33 U. S. C. under the same section numbers as are used in the original Act, except that each is prefixed with the figure "9"; e. g. section 2 appears in the code as section 902. In the interest of brevity we shall refer to them as they appear in the Act as it is printed at 44 Stat. 1424.

In the light of all the provisions of the Act, we are persuaded that the terms "payment" and "compensation" used in § 13(a) refer to the periodic money payments to be made to the employe.

The judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

So ordered.

Mr. Justice BLACK dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice MURPHY concur.

It has been said that the Act under consideration "should be construed liberally in furtherance of the purpose for which . . . enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co. et al. v. Norton, Deputy Commissioner et al.*, 284 U. S. 408, 414. The construction given the Act by the court below, which I think was correct, avoids such a result. The result of the construction here is to deprive an injured person of the compensation which the law intended he should have and which the insurance company, defendant, has admitted it owes. The only defense is a one-year statute of limitations, and that defense was not set up under circumstances that square with the Act's purposes. What are those circumstances?

These facts are undisputed: November 12, 1935, Pletz was injured while working for a steamship company which carried liability insurance with the Farmer's Fund Insurance Co., one of the appellants here. November 26, 1935, the insurance company's attorneys reported to the deputy commissioner administering the Act that payments to Pletz had begun and would continue until notice was given the commissioner. The insurance company did tender a check to Pletz while he was in the hospital which he declined because he thought it insufficient, and on December 4, 1935, the insurance company advised the Commissioner of the refusal. Negotiations between Pletz and the insurance company continued through repeated conversations for a year and five months. The Company lawyer testified that "I made the definite offer to him very early in the case that I would pay him his compensation any time he wanted to take it . . . and I told him that I made that offer and that he could take it any time he wanted to. . . ." It

is apparent that the controversy throughout was not over the existence of a just claim, but over its size.

November 5, 1936, while negotiations were still in progress, and only seven days before the expiration of the year, the Commissioner wrote the attorney asking about the status of the claim. The attorney responded six days before the statute is said to have operated. He gave no information that Pletz had never accepted compensation, and reported only that he had put Pletz under a doctor's care and that no report had been received from the doctor. If the Commissioner had thought that the claim was controverted, he would have been obligated under sec. 14(h) of the Act to hold hearings and take action "upon his own initiative" to protect the rights of the parties. Under that section such a course is required where payment has been stopped or suspended. Instead, the insurance company attorney, according to his own testimony, continued to negotiate with Pletz until his claim was finally filed on April 19, 1936. The claim itself was filled out in the company lawyer's office without a hint of limitations. Then, for the first time, the company "filed its controversial" with the Commissioner and pleaded in it the statute of limitations.

The Commissioner found in substance that there had been no over-reaching of Pletz by the Company and that therefore the Company was not estopped from setting up the statute. Accepting his finding of facts I think that the Commissioner's conclusion was based on an erroneous conclusion of the law concerning estoppel and limitations, and that the continuous process of negotiation and communication between the Company, Pletz, and the Commissioner, bar the defense made here.

In *Schroeder* v. *Young*, 161 U. S. 334, 344, this Court said:

"Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security."

Here, the insurance company's representative has sworn, and his evidence is undisputed, that he promised to pay Pletz "his

compensation any time he wanted to take it", a statement which was never withdrawn, and which in connection with the continued negotiations for a lump sum settlement, even after the statutory period had expired, was more than an equivalent of an express promise not to plead the statute of limitations. It is perhaps an understatement to say that the company attorney's conduct was a tacit encouragement to Pletz to act on the assumption that the Company would never dispute its constantly admitted liability. *Swain* v. *Seamens*, 9 Wall. 254, 274. The statement of the Supreme Court of Illinois is in harmony with the general rule of law throughout the country: "Where an insurance company leads a party to delay the bringing of suit, or to dismiss a suit already pending, by holding out hopes of adjustment, or by making promises to pay, it is estopped from taking advantage of such delay or dismissal, by pleading the statute of limitations." *Conductors' Benefit Association* v. *Loomis*, 142 Ill. 560; 572; cf. *Ennis* v. *Pullman Palace Car Co.*, 165 Ill. 161; 178; *O'Hara* v. *Murphy*, 196 Ill. 599. See also *Howard* v. *West Jersey, etc. Railroad Co.*, 102 N. J. Eq. 517, 522; *Baker-Matthews Manufacturing Co.* v. *Grayling Lbr. Co.*, 134 Ark. 351, 354, 355; *McLearn* v. *Hill*, 276 Mass. 519. These cases illustrate the principle announced by this Court "that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Insurance Company* v. *Wilkinson*, 13 Wall. 222, 233.